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No. 85-700

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM B. ALLEN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was the "alter ego" of a predecessor employer and therefore violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3) and (5), by refusing to assume the collective bargaining obligations of that employer, to apply the terms of an existing collective bargaining agreement to bargaining unit employees, and to continue making payments to various employee benefit funds.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Crawford Door Sales Co., 226 N.L.R.B. 1144 7

Goodman Piping Products, Inc. v. *NLRB*, 741 F.2d 10 ..... 6, 7, 8

Howard Johnson Co. v. *Detroit Local Joint Executive Board, Hotel Employees International Union*, 417 U.S. 249 ..... 6, 8

J.M. Tanaka Constr., Inc. v. *NLRB*, 675 F.2d 1029 ..... 6, 7

NLRB v. *Al Bryant, Inc.*, 711 F.2d 543, cert. denied, 464 U.S. 1039 7

NLRB v. *Campbell-Harris Elec. Co.*, 719 F.2d 292 6

NLRB v. *Herman Bros. Pet Supply, Inc.*, 325 F.2d 68 8

NLRB v. *Lewis*, 246 F.2d 886 8

NLRB v. *Trico Products, Inc.*, 636 F.2d 266 8

Page

Cases—Continued:

Nelson Electric v. *NLRB*,
638 F.2d 965 6-7

Southport Petroleum Co. v. *NLRB*,
315 U.S. 100 ..... 6, 7, 8

United States v. *Doe*, 465 U.S. 605 7

Universal Camera Corp. v. *NLRB*,
340 U.S. 474 7

Wisniewski v. *United States*,
353 U.S. 901 9

Statutes:

Bankruptcy Act, Ch. X, 11 U.S.C. (1976 ed.)
501 *et seq.* 2

National Labor Relations Act, 29 U.S.C.
151 *et seq.* 2

§ 7, 29 U.S.C. 157 5

§ 8(a)(1), 29 U.S.C. 158(a)(1) 5

§ 8(a)(3), 29 U.S.C. 158(a)(3) 5

§ 8(a)(5), 29 U.S.C. 158(a)(5) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 758 F.2d 1145. The decision and order of the National Labor Relations Board (Pet. App. 59-69) and the decision of the administrative law judge (Pet. App. 12-58) are reported at 267 N.L.R.B. 700.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1985. A petition for rehearing was denied on June 18, 1985 (Pet. App. 7-8). On August 21, 1985, Justice O'Connor extended the time within which to file a petition for writ of certiorari to and including October 1, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Labor Relations Board (the Board) found that petitioner's current firm was the alter ego of a series of predecessor companies and that petitioner had violated the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, in several ways by failing to satisfy the collective bargaining obligations of the predecessor businesses (Pet. App. 68-77). The court of appeals affirmed (*id.* at 1-5).

1. Petitioner William B. Allen was the president and general manager of Allen Materials, Inc. (AMI), a concrete and building supply business that had been incorporated in 1972 by petitioner's father as part of a merger of his father's pre-existing businesses. After the death of petitioner's father, AMI's stock was held by petitioner, his mother, and his four sons. The employees working in the ready-mix concrete part of the business were represented by General Drivers, Salesmen and Warehousemen Local 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union) pursuant to a series of collective-bargaining agreements between the Union and AMI. Pet. App. 1-2, 17, 54-55 n.4.

On February 1, 1978, AMI filed for reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. (1976 ed.) 501 *et seq.* The business was thereafter carried on as Allen Materials, Inc., Debtor-in-Possession (AMIDIP). Petitioner continued as its president and general manager. AMIDIP continued to observe the collective bargaining agreement that was in effect between AMI and the Union. Subsequently, while AMIDIP was in reorganization, petitioner and the Union entered into another collective bargaining agreement that was effective from March 1, 1980, to March 1, 1983. As part of the reorganization, AMIDIP sold off its concrete block plant, its data processing operation, its building materials inventory, most of its trucks, and its

warehouse to the point that by November 30, 1980, AMDIP's operations consisted solely of the sale and delivery of ready-mix concrete to six customers. In June 1981, the Union Planters National Bank of Memphis, having obtained leave of the bankruptcy court, foreclosed on mortgages covering all of the assets of AMIDIP, which ceased operations on about June 23. Pet. App. 17-18; Tr. 92-93, 161, 165, 166, 183, 200-201, 285-286.

On June 26, 1981, petitioner called a meeting of the seven drivers then working for AMIDIP. He told the drivers that the company was bankrupt, that it was " 'going to be up under another name,' " and that it would henceforth operate as a " 'non-union' " company (Pet. App. 26 (citation omitted)). Petitioner also told the drivers that he would need five drivers at the outset, that he expected that he would ultimately need ten drivers, and that he would honor existing seniority status, but that there would be " 'no pensions' " and that he " 'want[ed] no parts [*sic*] of the Union anymore' " (*id.* at 26-27 (citations omitted); see *id.* at 2).

On July 1, 1981, petitioner chartered Allcon, Inc. (Allcon), to engage in the production, sale, and delivery of ready-mix concrete, building materials, concrete blocks, sand and gravel, and to offer data processing services—the same line of business that AMIDIP, AMI, and their predecessors had engaged in. From then until early 1982—when, as a result of a lien for unpaid taxes obtained by the Internal Revenue Service (IRS), it ceased operations—Allcon produced and delivered ready-mix concrete. Petitioner ran Allcon as its president and general manager; Allcon had no corporate books, minutes, or stockholders and officers other than petitioner. Allcon produced concrete using a plant that previously had been owned by AMIDIP and AMI, and delivered the concrete, using six leased trucks—two of which previously had been leased by AMIDIP—to six customers, all of whom previously had been customers of AMIDIP. Allcon's supervisors, secretary-bookkeeper,

and drivers all had held the same positions with AMIDIP. Drivers received the same wages that they had received from AMIDIP. Allcon did not recognize the Union or abide by the AMIDIP-Union collective bargaining agreement with respect to its drivers. In particular, Allcon did not make contractually required fringe and benefit payments on behalf of its drivers to employee benefit funds. Pet. App. 2-3, 19-23, 41.

Following Allcon's cessation of business in early 1982 as the result of the IRS lien, petitioner incorporated Allen Concrete, Inc. (ACI) " 'to make, produce, process, transport, package, store, buy and sell ready-mix concrete, building materials, concrete blocks, sand and gravel' " and to carry out related activities (Pet. App. 3 (citation omitted)). Like Allcon, ACI had no officers, stock, corporate minutes, books or records, or documents of ownership. Petitioner was ACI's general manager. ACI operated out of the same business address and plant as had Allcon. Many of ACI's customers also had been customers of Allcon; in addition, ACI sold concrete to "Allen Construction," a partnership consisting of petitioner and two individuals who were former supervisors of Allcon and AMIDIP. ACI, as did Allcon, used leased trucks to make its deliveries. ACI's drivers previously had worked for Allcon and AMIDIP. ACI did not recognize the Union, abide by the collective bargaining agreement, or make the contractual fringe and benefit payments on behalf of its drivers. Pet. App. 3, 19-22, 41.

2. Adopting the opinion of the administrative law judge (Pet. App. 60), the Board found that petitioner "continues to be the common strand, linchpin, principal, operator, and guiding star of the business * * * in question; and, although that business has, after its expansion, undergone a contraction to its earlier proportion, it continues to be a ready-mix concrete business, conducted in the same manner, at one of its same locations, under the same supervision, with the

same unit employees and customers—although, to be sure, not as many [—] * * * [a]ll * * * without hiatus in operations" (Pet. App. 31). The Board also found that petitioner "has, without hiatus in operations, formed a succession of corporations under the same ownership, management, and, in part, location, employees, and customers as [AMI] and * * * [AMIDIP], with the avowed purpose and intention * * * of operating 'non-union' and thereby attempting to evade or avoid the obligations of the subsisting collective agreement" (*id.* at 33-34).

Based on those findings, the Board held that petitioner—as well as Allcon and ACI—violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by informing his employees on June 26, 1981, that all future operations would be performed on a non-union basis and that employees could continue to work for him only on that basis, and by operating on a non-union basis after that date (Pet. App. 42, 68 n.2). The Board also concluded that petitioner, Allcon, and ACI violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by refusing to make payments to employee benefit plans as required by the existing collective bargaining agreement (Pet. App. 42-43). Finally, the Board concluded that petitioner Allcon, and ACI also violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by refusing to recognize and bargain with the Union, by repudiating the existing collective bargaining agreement, and by refusing to make payments to employee benefit funds as required by that agreement (Pet. App. 43-44).[1]

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[1]The Board's order requires petitioner, Allcon, and ACI to cease and desist from the above-described unfair labor practices and from interfering with employees' exercise of their rights under Section 7 of the Act, 29 U.S.C. 157. Petitioner, Allcon, and ACI were also required, upon request, to bargain with the Union retroactively to the date upon which any one of them had failed to recognize the Union; if requested, to embody any understanding in a signed agreement; retroactively to

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1-5). The court concluded (*id.* at 4-5) that substantial evidence supported the Board's finding that petitioner was an alter ego of AMIDIP within the meaning of *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no legal issue of general importance. Accordingly, review by this Court of petitioner's fact-bound claims is not warranted.

It is well-settled that where an employer is a party to a collective bargaining agreement, ceases doing business in one form, and re-establishes itself in another, the latter, if found to be simply the "alter ego" of the former, must continue to recognize the union and honor the terms of the collective bargaining agreement. See *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel Employees International Union*, 417 U.S. 249, 259 n.5 (1974); *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942). The determination whether one firm is the alter ego of another requires an assessment of a variety of factors, such as whether the two enterprises have a substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. See, *e.g.*, *Goodman Piping Products, Inc.* v. *NLRB*, 741 F.2d 10, 11 (2d Cir. 1984); *NLRB* v. *Campbell-Harris Elec. Co.*, 719 F.2d 292, 295 (8th Cir. 1983); *J.M. Tanaka Constr., Inc.* v. *NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *Nelson Electric*

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apply (except to the extent modified by agreement with the Union) the terms and conditions of the March 1980-March 1983 agreement; fully to compensate employees for any losses they suffered as a result of the unfair labor practices; and to post appropriate notices to this effect. Pet. App. 47-53, 60-66, 68-69 nn.3-4.

v. *NLRB,* 638 F.2d 965, 968 (6th Cir. 1981); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144, 1144 (1976). The ultimate issue is a question of fact (*Southport Petroleum Co.,* 315 U.S. at 106; *Goodman Piping Products, Inc.*, 741 F.2d at 11; *NLRB* v. *Al Bryant, Inc.,* 711 F.2d 543, 551 (3d Cir. 1983), cert. denied, 464 U.S. 1039 (1984)), and the Board's finding must be upheld if there is substantial evidence to support it (*Goodman Piping Products, Inc.*, 741 F.2d at 11; *J.M. Tanaka Constr., Inc.,* 675 F.2d at 1033; see *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488 (1951)).

Petitioner does not take issue with these principles; rather, he contends (Pet. 17-29) that the evidence does not support the Board's finding that AMIDIP, Allcon, and ACI were one and the same. However, the Board found that ACI was the alter ego of the predecessor businesses, and the court of appeals saw no reason to disturb that finding (see Pet. App. 4). Given these findings by the Board and the court of appeals, review by this Court of petitioner's fact-bound claim is not warranted. See, *e.g., United States* v. *Doe,* 465 U.S. 605, 613-614 (1984). In any event, as shown above (pages 2-4), the evidence amply supports the Board's alter ego finding.[2]

Petitioner claims (Pet. 14-17) that an alter ego finding cannot be made in this case because AMIDIP went out of business as a result of bankruptcy proceedings. To the

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[2]Petitioner's comparison (Pet. 20-24) between AMI and Allcon overlooks the fact that seven months prior to its foreclosure AMIDIP had been reduced to a small ready-mix concrete supplier serving only six customers. The Board properly took that diminution into consideration and, accordingly, properly compared AMIDIP's operations as they stood in 1981 to those of Allcon for the purpose of assessing continuity. Moreover, the diminution in the scope of an enterprise is not inconsistent with the existence of an alter ego relationship between the pre- and post-foreclosure entities. See, *e.g., J.M. Tanaka Constr., Inc.*, 675 F.2d at 1034.

extent that petitioner claims (*id.* at 15) that an alter ego finding requires proof of an intent to evade existing obligations under a collective bargaining agreement, petitioner's claim is not supported by *Southport Petroleum Co.* v. *NLRB, supra,* on which petitioner relies (Pet. 12-14).[3] A new firm can be the alter ego of a former company where the new firm is established solely for the purpose of continuing operations while ridding itself of a union or where an economically motivated closing of a company is seized upon as an opportunity " 'to shake the union' " (*NLRB* v. *Lewis,* 246 F.2d 886, 888 (9th Cir. 1957); see *Goodman Piping Products, Inc.*, 741 F.2d at 11-12 (anti-union animus not necessary for an alter ego finding); *NLRB* v. *Trico Products, Inc.*, 636 F.2d 266, 270-271 (10th Cir. 1980)). In this case, the Board found that petitioner used the closing of AMIDIP to eliminate the Union, and that factual finding does not warrant review by this Court.[4]

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[3]In *Southport Petroleum,* this Court described the alter ego inquiry as involving the determination "[w]hether there was a *bona fide* discontinuance and a true change of ownership * * * or merely a disguised continuance of the old employer," which is "a question of fact properly to be resolved by the Board" (315 U.S. at 106). Thus, where there is either no "*bona fide* discontinuance" or no "true change of ownership" the Board is entitled to find that the new firm is simply the alter ego of the old one. In this case, the board found that there was no "true change of ownership" from AMIDIP to Allcon to ACI, and the court of appeals upheld that finding on the ground that it was supported by substantial evidence. Petitioner's assertion (Pet. 14-15) that *Southport Petroleum* requires an intent to evade labor obligations is erroneous. See *Howard Johnson Co.*, 417 U.S. at 259 n.5 (emphasis added) (noting that alter ego relationships "*frequently* [are accomplished] to avoid the effect of the labor laws"); *Goodman Piping Products, Inc.*, 741 F.3d at 11-12 (anti-union animus not necessary for an alter ego finding).

[4]Petitioner errs in claiming (Pet. 14-15) that *NLRB* v. *Herman Bros. Pet Supply, Inc.*, 325 F.2d 68 (6th Cir. 1963), forbids the Board from making an alter ego finding in the absence of proof that a business change was done for the purpose of evading existing labor obligations. There, the court upheld the Board's finding that an employer closed one

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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business and opened another for that purpose, but the court did not hold that such intent is necessary for an alter ego finding. In any event, any alleged intracircuit conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).